Supreme Court, U.S.
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No. 87-1891

In The
Supreme Court of the United States
October Term, 1987

DRUID HILLS CIVIC ASSOCIATION, INC., *et al.*,
Petitioners,

v.

THE FEDERAL HIGHWAY ADMINISTRATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether the district court abused its discretion in finding an order remanding an action to an administrative agency for further action is not a final order which deprives the court of jurisdiction thereafter.

2.

Whether the district court abused its discretion in denying Plaintiffs' Conditional Motion for Voluntary Dismissal after a four-day trial, appeal, remand, and filing of Motion for Summary Judgment by Defendants.

3.

Whether the district court abused its discretion in granting a Motion for Summary Judgment which was substantively unopposed.

4.

Whether the district court abused its discretion in denying attorney's fees to a non-prevailing party.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Druid Hills Civic Association, Inc., Inman Park Restoration, Inc., Candler Park Neighborhood Organization, Caution, Inc., Jack Boozer, Phyllis Schwartz, John T. Juricek, Neil C. Moran, William E. McMurray, and Quinn Hudson. The corporate petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

The parties below also were respondents The Federal Highway Administration, United States Department of Transportation, R. A. Barnhart, D. J. Altobelli, Thomas D. Moreland, Georgia Department of Transportation, United States Environmental Protection Agency, Carl Jeter, and the United States of America.

Amicus curiae below was Carter Presidential Library Inc.

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STATEMENT OF THE CASE

Proceedings Below

Respondents Georgia Department of Transportation and Thomas D. Moreland ("State Respondents") feel compelled to review the proceedings below because of Petitioners' flagrant mischaracterizations of those proceedings.

In September of 1984 the Federal Highway Administration and U.S. Department of Transportation approved the Environmental Impact Statement and made the Section 4(f) determinations on the Presidential Parkway project in Atlanta, Georgia. The project connects the central business district with the eastern suburbs and provides access to the Carter Presidential Library.[1] Within days Petitioners filed this action seeking to enjoin construction of the Parkway.

After a four-day trial in October of 1984, the district court refused the injunction and found in favor of the state and federal defendants on each issue. On appeal the Eleventh Circuit affirmed the district court on most of the issues, but was "unable to review the correctness of the district court's findings" on the Section 4(f) comparisons of two alternates because the document did not show the facts upon which the Secretary of Transportation relied. *Druid Hills Civic Association, Inc. v. Federal Highway Administration*, 772 F.2d 700, 717-18 (11th Cir. 1985). The case was remanded to the "district court for proceedings

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[1]Carter Presidential Library, Inc. has been an *amicus* in support of the state and federal defendants at every stage of this litigation, stating it has and continues to support the Parkway concept as proposed.

consistent with this opinion." 772 F.2d at 719. The Eleventh Circuit's opinion, which included the direction that "the case must be remanded to the Secretary" (772 F.2d at 718), was made the judgment of the district court on November 15, 1985. Although the case was still pending, Petitioners moved for an award of attorney's fees, which was opposed by all Respondents.

In April of 1986 the federal defendants filed a supplemental record and the Secretary of Transportation's revised Section 4(f) determinations with the district court. They then filed a Motion for Summary Judgment that the revised determination met the mandates of Section 4(f). This motion, substantively unopposed, was granted by the district court. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 650 F. Supp. 1368 (N.D. Ga. 1986). The ruling was affirmed by the Eleventh Circuit. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 833 F.2d 1545 (11th Cir. 1987). Motions for Rehearing and Rehearing *en banc* were denied and Petitioners' Application for Writ of Certiorari followed.

Statement of Facts

Petitioners' Statement of Facts, while essentially correct, is given to overstatement. Petitioners imply that the proposed Parkway cuts through every historic district in Atlanta, but the record shows it was carefully planned to avoid all but the southern-most fringe of one historic district. Nor does the road destroy four parks; it in fact touches four parks, but destroys none:

Park Name	Present Acreage	Net Usage	Remaining Acreage
Goldsboro Park	2.9	0.6	2.3
Candler Park	58.0	2.9	55.1
Shady Side Park	4.5	0.9	3.6
Dellwood Park	6.0	0.05	5.95

The Eleventh Circuit has never characterized the Secretary of Transportation's decisions as legally insufficient. Rather, the Circuit Court remanded the case because the Section 4(f) determination was not sufficiently documented for the court to reach a decision on some aspects of it. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 717-18 (11th Cir. 1985).

Most important to an evaluation of the decisions in this case is the fact that the Petitioners *elected* not to respond to the merits of the federal Motion for Summary Judgment. As late as thirty days before a hearing on that motion the district court invited a substantive response from the Petitioners, which they elected not to make. *See,* App. A.

SUMMARY OF ARGUMENT

Petitioners seek review of merely the application of settled principles to the particular facts of this action. The Respondents' election not to dispute the substance of the Federal Highway Administration's Motion for Summary Judgment has left no substantive issue for decision.

An order remanding an action to an administrative agency for further action is an interlocutory order.

Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); *Howell v. Schweiker,* 699 F.2d 524 (11th Cir. 1983). Such an order does not deny the district court of jurisdiction of the matter. *Taylor v. Heckler,* 778 F.2d 674 (11th Cir. 1985). This principle has been applied to numerous environmental cases. *See, e.g., Louisiana Environmental Society v. Dole,* 707 F.2d 116 (5th Cir. 1983); *Stop H-3 Association v. Coleman,* 533 F.2d 434 (9th Cir. 1976); *Fayetteville Area Chamber of Commerce v. Volpe,* 515 F.2d 1021 (4th Cir. 1975), *cert. den. sub. nom. Interstate 95 Committee v. Coleman,* 423 U.S. 912 (1975). The district court was correct in retaining jurisdiction of this action.

After a four-day trial, denial of their requested injunctions, an appeal affirming findings for the Respondents on all Environmental Impact Statements and most Section 4(f) issues but remanding on one issue, additional development of that issue and the filing of the Federal Highway Administration's Motion for Summary Judgment, Petitioners filed a Conditional Motion for Voluntary Dismissal without prejudice. Based upon findings of prejudice against Respondents, the district court properly denied the motion. *Litman v. Massachusetts Mutual Life Insurance Co.,* 825 F.2d 1506 (11th Cir. 1987).

After the Federal Highway Administration filed its Motion for Summary Judgment Petitioners elected not to respond substantively, despite a request from the district court. They failed to comply with F.R.C.P. Rule 56(f) and also did not file an appropriate response to the motion under Local Rule 220-5(b)(2). By Petitioners' own election the motion was unopposed and properly granted. *Simon v. Kroger Company,* 743 F.2d 1544 (11th Cir. 1984), *cert. den.* 471 U.S. 1075 (1985).

The primary relief sought by the Petitioners from the outset of this action has been to enjoin construction of the Presidential Parkway. However, no injunction has ever been issued by any court. Petitioners have never received any relief on the merits of their claim; the only relief they have ever gotten is a remand. This is insufficient to have them considered a prevailing party and entitled to attorney's fees. *Hanrahan v. Hampton,* 446 U.S. 754 (1980); *Kitchen Fresh, Inc. v. NLRB,* 729 F.2d 1513 (6th Cir. 1984); *McGill v. Secretary of Health and Human Services,* 712 F.2d 28 (2nd Cir. 1983), *cert. den.* 465 U.S. 1068 (1984). Additionally, on remand it was the Secretary, not the State Respondents, responsible for relief. Because Petitioners did not prevail against the State Respondents, no attorney's fees can be awarded against those Respondents. *Kentucky v. Graham,* 473 U.S. 159 (1985).

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REASONS FOR DENYING THE WRIT

INTRODUCTION

Petitioners' Application for Writ of Certiorari presents no substantive issue for this Court's determination. The issues presented address only the application of well-settled procedural principles. There is no conflict among the circuits over the principles themselves or over their application to the facts of this case.

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PROCEDURAL PRINCIPLE THAT A REMAND ORDER IS NOT A FINAL ORDER.

Petitioners' contentions on the jurisdictional issue are based upon the erroneous proposition that a remand order is a final order. They contend that the Eleventh Circuit's September 16, 1985, decision remanding this case to the Secretary of Transportation (*Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700 [11th Cir. 1985]), ended the litigation and required the Federal Highway Administration to commence a "new administrative proceeding." Petitioners use this erroneous supposition to bootstrap the argument that the district court retained no jurisdiction over the later developments in this case. The argument not only distorts the facts but overlooks the substance of the Eleventh Circuit's remand order and controlling valid precedent.

In the original Complaint Petitioners prayed that the construction of the Presidential Parkway be permanently enjoined because of alleged erroneous environmental decisions. (R1-1-21). After trial, the Eleventh Circuit affirmed all of the district court's findings against Petitioners on each of the Environmental Impact Statement (42 U.S.C. § 4332) issues. 772 F.2d at 708-13. However, after approving some of the district court's findings in favor of the Federal Respondents on Section 4(f) issues, the Eleventh Circuit remanded " . . . to the Secretary for adequate findings of impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue

plans." 772 F.2d at 718. The Section 4(f) issues raised by Petitioners, and the relief sought in their Complaint, were not fully resolved at the time of remand. Additional work was needed on the part of the United States Secretary of Transportation.

Pursuant to the Eleventh Circuit's decision, the district court remanded this case to the Secretary. (R4-33). An order remanding a cause for further administrative agency action is uniformly held to the interlocutory and not final. *See, e.g., Bender v. Clark,* 744 F.2d 1424, 1426-27 (10th Cir. 1984); *Howell v. Schweiker,* 699 F.2d 524, 526-27 (11th Cir. 1983); *McCoy v. Schweiker,* 683 F.2d 1138, 1141 n.2 (8th Cir. 1982); *Tookes v. Harris,* 614 F.2d 1296 (5th Cir. 1980), *see* 699 F.2d at 528; *Eluska v. Andrus,* 587 F.2d 996, 999 (9th Cir. 1978); *Pauls v. Secretary of the Air Force,* 457 F.2d 294, 297-98 (1st Cir. 1972); *Mayersky v. Celebrezze,* 353 F.2d 89 (3rd Cir. 1965). The Eleventh Circuit thus concisely restated what has long been the law when it provided:

> "Because this circuit considers a remand order an interlocutory order, it follows by operation of law that the district court retains jurisdiction of the case until the proceedings on remand have been concluded." *Taylor v. Heckler,* 778 F.2d 674, 677 n.2 (11th Cir. 1985); *See, Pollgreen v. Morris,* 770 F.2d 1536, 1546 (11th Cir. 1985).

In *Louisiana Environmental Society v. Coleman,* 537 F.2d 79 (5th Cir. 1976), the court affirmed a number of highway-environmental issues but remanded the Section 4(f) determination for further fact-finding by the Secretary. On remand, the agency conducted additional fact-finding and issued a new Section 4(f) determination,

which was then submitted by the government in the original civil case with a motion for an order to show cause why judgment should not be entered. The district court proceeded to rule on the Section 4(f) issue (*Louisiana Environmental Society v. Brinegar,* 513 F. Supp. 179, 181 [W.D. La. 1981]), which ruling was appealed. *Louisiana Environmental Society v. Dole,* 707 F.2d 116 (5th Cir. 1983) (*LES II*). The Fifth Circuit proceeded to rule on the Section 4(f) determination that had been rendered on remand and affirmed the same. 707 F.2d 119-23.

The decisions in *Pollgreen* and *Taylor, supra,* are consistent with *LES II* and with the weight of authority in other highway-environmental cases where EIS or Section 4(f) issues have been remanded to the Secretary. *See, e.g., Fayetteville Area Chamber of Commerce v. Volpe,* 463 F.2d 402 (4th Cir. 1972), *on remand,* 386 F. Supp. 572 (E.D.N.C. 1974), *aff'd* 515 F.2d 1021 (4th Cir. 1975), *cert. denied sub nom. Interstate 95 Committee v. Coleman,* 432 U.S. 912 (1975); *Stop H-3 Association v. Coleman,* 533 F.2d 434 (9th Cir. 1976); *Harrisburg Coalition Against Ruining the Environment v. Volpe,* 381 F. Supp. 893 (M.D. Pa. 1974).

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PROCEDURAL PRINCIPLE THAT A VOLUNTARY DISMISSAL IS NOT PROPER WHEN PREJUDICE RESULTS TO THE OPPOSING PARTY.

To begin a look at this question it is helpful to grasp the context in which Petitioners filed their Conditional Motion for Voluntary Dismissal. As early as May 16,

1986, all parties understood that this case was active. (R11). On June 6, 1986, the Federal Highway Administration filed its Motion for Summary Judgment. (R4-52). Not until July 18, 1986, after responding to the Federal Motion for Summary Judgment (R5-54), did Petitioners file their Conditional Motion for Voluntary Dismissal. (R5-56). Petitioners' Motion was denied (*Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 650 F.Supp. 1368, 1372 [N.D. Ga. 1986]) and the question before the Eleventh Circuit was whether the district court abused its discretion in denying the voluntary dismissal.

In finding no abuse of discretion the Eleventh Circuit relied upon *Litman v. Massachusetts Mutual Life Insurance Co.,* 825 F.2d 1506 (11th Cir. 1987) (en banc). After remand for further proceedings, the right to those new proceedings belongs to neither party individually, but rather to both. 825 F.2d at 1514. To have allowed voluntary dismissal would have effectively rendered a nullity the Eleventh Circuit's 1985 decision affirming most of the district court's order and remanding the case to the Secretary for further proceedings on one limited issue.

Immediately the prejudice becomes clear. Petitioners would not consider a dismissal with prejudice as to any part of this case. (R12-47-48). There had been a four-day trial. The Eleventh Circuit had already affirmed the district court's finding against Petitioners on all of the Environmental Impact Statements issues raised in this case. *Druid Hills Civil Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 708-13 (11th Cir. 1985). Additionally, some of the United States Secretary of Trans-

portation's findings on the Section 4(f) issues had been affirmed. 772 F.2d at 715. Those issues required finality, but Petitioners' stated desire was to resurrect them in another forum. (R12-40-43).

The only question before the district court on remand involved a decision of the United States Secretary of Transportation. 777 F.2d at 718. Yet, Petitioners' desire was to voluntarily dismiss and litigate in state court, where the United States cannot involuntarily be made a party. As the district court correctly noted: "The State Court doesn't have any right to adjudicate whether or not the Secretary of Transportation has properly discharged her duties." (R12-42 - R12-43). The Georgia Supreme Court has stated that the Georgia courts will not entertain issues regarding decisions of the United States Secretary of Transportation which are prerequisite to the appropriation of federal money to the State. *Morningside-Lenox Park Association, Inc. v. State Highway Department*, 224 Ga. 344, 346 (1968).

The cases relied upon by Petitioners do not provide a grounds for granting certiorari in this case. Only one involves an attempt to dismiss after remand; in the remainder the motion for voluntary dismissal came before trial and any appeal. *See, Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143 (9th Cir. 1982); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46 (1st Cir. 1981); *Hoffmann v. Alside, Inc.*, 596 F.2d 822 (8th Cir. 1979); *LaCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031 (5th Cir. 1974); *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366 (5th Cir. 1967); *see, La-Tex Supply Co. v. Fruehauf Corp.*, 444 F.2d 1366 (5th Cir. 1971), *cert. den.*

404 U.S. 942 (1971) (not abuse or discretion to deny voluntary dismissal during the course of trial).

The sole exception, *Davis v. USX Corp.*, 819 F.2d 1270 (4th Cir. 1987), involved an appeal from a summary judgment. To make the order final and appealable the plaintiff dismissed her Title VII claims, leaving only common law tort claims based upon diversity of citizenship. *Davis v. United States Steel Corp,* 779 F.2d 209, 211 (4th Cir. 1985). After reversal on appeal, with only pendent state claims which could be tried in a state court remaining, plaintiff sought to voluntarily dismiss. In the case at bar the only remaining issue, the action of the United States Secretary of Transportation, *cannot* be tried in a state court.

The decision appealed from shows that the district court did not abuse its discretion in denying Petitioners' voluntary dismissal. *Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir. 1987). The only thing Petitioners have shown in their application is that the threat of a second lawsuit is insufficient grounds for denying a voluntary dismissal. The district court agreed, but found additional factors of prejudice. 650 F. Supp. at 1372. Those factors remain unchallenged here.

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PROCEDURAL PRINCIPAL THAT AN UNOPPOSED MOTION FOR SUMMARY JUDGMENT WILL BE GRANTED.

The second part of Petitioner's argument on this point, that they were given no opportunity to respond to

the merits of the Federal Highway Administration's Motion for Summary Judgment, requires a denial of the record. As late as thirty days before a hearing on the federal Motion for Summary Judgment, the district court issued an order inviting Petitioners to respond substantively to the Motion. App. A; R5-68-2; 833 F.2d at 1550. They elected not to do so.

Nor did the district court abuse its discretion in denying discovery. After the Federal Highway Administration filed its Motion for Summary Judgment, it was incumbent upon Petitioners to respond substantively. They elected to respond otherwise.

After the Motion was filed on June 6, 1986 (R4-52), Petitioners first gained an extension of time to respond. (R5-53). They subsequently filed no less than five responses (R5-54, 56, 57, 60 and 61); however, in none of these did they respond substantively to the merits of the Federal Motion. Rather, they chose to respond only to procedural and jurisdictional questions. *See, e.g.*, R5-54-1-26. On September 16, 1986, the district court invited a substantive response to the Motion (App. A), but no subsequent response was filed. Even the proposed brief attached to Petitioners' August 20, 1986 pleading (R5-61-6-16) provided no substantive response to the Federal Motion.

After the Federal Highway Administration filed its Statement of Material Facts with the Motion for Summary Judgment, Petitioners did file a response thereto. (R5-54). That response was either to admit the facts or feign ignorance. (R5-54-27-30). This is an unacceptable response to a Motion for Summary Judgment. N.D. Ga. Local Rule 220-5(b)(2).

Local Rule 220-5(b)(2) states:

> "The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of F.R. Civ.P. 56(f)."

Federal Rules of Civil Procedure, Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot *for reasons stated* present by affidavit facts essential to justify his opposition, the court may . . . [inter alia] permit . . . depositions to be taken or discovery to be had . . . ." (Emphasis and matter in brackets added).

Petitioners alleged Rule 56(f) affidavit (R5-54 Ex. B) failed for two reasons: it was not an affidavit of a party, but of counsel; it stated no reasons why substantive opposition to the Motion could not be made. The affidavit of counsel stated only that he had not done discovery because he did not believe any matter was properly before the court and that before any decision was made on the merits ". . . discovery would be necessary." R5-54-Ex.B, ¶ 5.

The question here is not the alleged "arbitrary power" of the district court, or the Eleventh Circuit's improper application of the correct standard of review, but the Petitioners' failure to respond to the Motion for Summary Judgment. Because Petitioners made no attempt to substantively reply to the Motion, that Motion was in fact unopposed. *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869 (5th Cir. 1978); *Oglesby v. Terminal Transport Co., Inc.*, 543 F.2 1111 (5th Cir. 1976); *See, Druid Hills Civic Association, Inc. v. Federal Highway Administration,*

650 F. Supp. 1368, 1373 n. 1 (N.D. Ga. 1986). Failure to comply with Local Rule 220, formerly Local Rule 90, is proper grounds for granting a summary judgment as unopposed. *Simon v. Kroger Company*, 743 F.2d 1544 (11th Cir. 1984), *cert. den.* 471 U.S. 1075 (1985). Having made an election not to address the merits of the Motion, Petitioners now complain that they were given no opportunity to respond on the merits. The record itself belies their position and substantiates that the district court did not abuse its discretion in refusing to allow discovery.

IV. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PRINCIPLE THAT ATTORNEY'S FEES ARE AWARDED ONLY TO PREVAILING PARTIES.

A. PETITIONERS ARE NOT A PREVAILING PARTY IN THIS ACTION.

It has been clear from the outset of this litigation that Petitioners' only goal was an injunction to stop construction of the Presidential Parkway. Contrary to their contention that their entire prayer for relief was a request to set aside approval of the project, the primary prayer was for an order to

> "... temporarily restrain, and preliminarily and permantly enjoin Defendants from taking any actions toward the construction of the [Presidential Parkway]." R1-1-21.

Everything else was subordinated to that goal. But no court has ever issued an injunction in this case. Contrary to Petitioners' assertion, work on the Presidential Parkway has never stopped because of this case.

Attorney's fees may be recovered only by a prevailing party. 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The term "prevailing party" is a flexible one that is dependent on the relief sought and actually obtained in a particular case. *B & J Music, Inc. v. McAuliffe*, 719 F.2d 1536, 1538 (11th Cir. 1983). While the party need not be successful in each and every claim asserted, it must achieve significant relief to which it was entitled. *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982).

The mere fact that a party gets what it is after does not make it a prevailing party under 42 U.S.C. § 1988, unless it prevails on a significant legal issue to achieve the *primary relief sought*. *B & J Music, Inc. v. McAuliffe*, 719 F.2d 1536, 1539 (11th Cir. 1983); *Robinson v. Kimbrough*, 652 F.2d 458, 478 (5th Cir. 1981); *Iranian Students Association v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. 1981); *cf. Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981). Nor is a party considered to be prevailing if it obtains mere procedural victories. Congress' intent was to permit interim awards of attorney's fees only when a party has prevailed *on the merits* of some of its claims. *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980); *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1982).

An examination of the relief sought and actually obtained *(B & J Music, Inc. v. McAuliffe, supra)* in this case shows that Petitioners were not a prevailing party for purposes of 42 U.S.C. § 1988. The district court correctly analyzed Petitioners' case, and the relief sought, under the precedent of this Court. *Druid Hills Civic Association, Inc. v. Federal Highway Administration*, 650 F. Supp. 1368, 1377 (N.D. Ga. 1986).

Neither the district court nor the Eleventh Circuit granted Petitioners any of the substantive relief sought, *i.e.*, enjoin the project and have the Secretary's decision declared illegal. (R1-1-21). The remand was at most a procedural victory and not a victory on the merits of any of Petitioners' claims. *See, Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980); *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1982); for cases dealing specifically with the denial of attorney's fees when a case has been only remanded, *see, e.g., Brown v. Secretary of Health and Human Services*, 747 F.2d 878 (3rd Cir. 1984); *Kitchen Fresh, Inc. v. National Labor Relations Board*, 729 F.2d 1513 (6th Cir. 1984); *McGill v. Secretary of Health and Human Services*, 712 F.2d 28 (2nd Cir. 1983), *cert. den.* 465 U.S. 1068 (1984); *National Labor Relations Board v. Doral Building Services, Inc.*, 680 F.2d 647 (9th Cir. 1982).

It is the failure of Petitioners to achieve any substantive relief whatsoever during four years of litigation which distinguishes this case from every case cited by them on the attorney's fees issue. In most of the cited cases relief was obtained in the form of an injunction. *Sierra Club v. Army Corps of Engineers*, 776 F.2d 383, 387 (2nd Cir. 1985) (court also found "willful derogation of law"); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1242 (9th Cir. 1984); *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 588 (3rd Cir. 1984); *Environmental Defense Fund, Inc. v. Watt*, 722 F.2d 1081, 1084 (2nd Cir. 1983) (settled under threat of injunction); *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1477 (9th Cir. 1983). Even the case relied upon most heavily by Petitioners is one in which the plaintiffs

were granted a writ of mandamus. *Guerrero v. Marsh,* 819 F.2d 238, 242 (9th Cir. 1987).

Even the cases cited by Petitioners for the proposition that a procedural victory entitles a party to attorney's fees do not stand for that proposition. They stand for the proposition that securing minor substantive relief may be sufficient to have a party considered "prevailing." *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897 (3rd Cir. 1985) (relief sought through litigation precipitated relief through legislation and regulation); *Fast v. School District of City of Ladue,* 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc) (ordered procedures to secure plaintiff's constitutional rights in a termination proceeding); *Bagby v. Beal,* 606 F.2d 411, 413 (3rd Cir. 1979) (ordered specific termination hearing procedures to secure plaintiffs' constitutional rights).

B. PETITIONERS ARE NOT A PREVAILING PARTY AGAINST THE STATE RESPONDENTS IN THIS ACTION.

Even if it were determined that Petitioners were a "prevailing party" generally in this case, which the State Respondents submit they are not, the inquiry does not end. Regardless of whether Petitioners are a prevailing party as against the Federal Respondents, the orders below are correct to the extent they determine Petitioners are not a prevailing party as against the State Respondents. Section 1988 (42 U.S.C. § 1988) does not create attorney's fees liability where liability on the merits is non-existent. *Kentucky v. Graham,* 473 U.S. 159 (1985).

Section 1988 does not specifically define the parties who must bear the attorney's fees. However, it logically

follows that the party legally responsible for relief on the merits is the party who should bear attorney fee liability. 473 U.S. at 164. In the present case no injunction has been issued against the State Respondents; no decision of the State Respondents has been found to be erroneous. All the Environmental Impact Statement issues were resolved in the State Respondents' favor. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 708-13 (11th Cir. 1985).

The case was remanded solely on the issue of a decision of Federal Respondent, U.S. Secretary of Transportation.

> "[T]he case must be remanded to the Secretary. . . . [W]e are mindful of the tremendous task confronting the Secretary in resolving these difficult issues." 772 F.2d at 718.

On remand it was the Secretary who was responsible for relief. Petitioners did not prevail against the State Respondents and 42 U.S.C. § 1988 does not authorize a fee award against them. *Kentucky v. Graham,* 473 U.S. 159, 165 (1985).

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CONCLUSION

Because Petitioners did not substantively oppose the Federal Highway Administration's Motion for Summary Judgment, Petitioners seek review only of the application of settled procedural principles without conflict among the circuits. All were properly applied in this case. For the foregoing reasons it is respectfully submitted that Petitioners' Application for Writ of Certiorari should be DENIED.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DRUID HILLS CIVIC ASOCIATION, INC., et al.	)	
vs.	)	CIVIL NO. C84-1931A
FEDERAL HIGHWAY ADMINISTRATION, et al.	)	

ORDER

Presently before the court are plaintiffs' motion for attorneys' fees, federal defendants' motion for summary judgment, plaintiffs' conditional motion for voluntary dismissal as to the subject matter of federal defendants' motion for summary judgment, plaintiffs' motion to allow filing of amendment to and clarification of plaintiffs' brief in support of plaintiffs' application for fees, costs, and expenses, and plaintiffs' motion to allow plaintiffs to file reply briefs in opposition to federal defendants' motion for summary judgment.

After careful review of the record, the court has determined that a hearing on the federal defendants' motion for summary judgment would be beneficial. The parties are directed to appear on October 17, 1986, at 9:30 a.m. at the United States Courthouse, 75 Spring Street, S.W., Courtroom 1906, Atlanta, Georgia. This hearing date is contingent on the court's completing a criminal trial in the Gainesville Division set to begin on September 29, 1986. Attorneys for all parties should call Jerry Evans, Courtroom Deputy Clerk, one week prior to the

hearing to confirm this date. At the hearing all parties should be prepared to discuss the merits of federal defendants' motion for summary judgment and all issues related to that motion, including plaintiffs' conditional request for interlocutory appeal and additional discovery time.

The court will allow plaintiffs' motion to file a reply brief in opposition to federal defendants' motion for summary judgment. L.R. 220-1(b)(2) (N.D. Ga.). The court grants plaintiffs until September 22, 1986 to file their reply brief.

The court will not decide the other motions until after the hearing on federal defendants' motion for summary judgment. Although plaintiffs' motion for attorneys' fees has been pending before the court since May 20, 1986, the court is of the opinion that the motion may be affected in some manner by future developments in the defendants' motion for summary judgment.

Accordingly, plaintiffs' motion to file reply briefs in opposition to federal defendants' motion for summary judgment is granted, and a hearing is set for October 17, 1986, at 9:30 a.m. on federal defendants' motion for summary judgment.

IT IS SO ORDERED this 16th day of September, 1986.

/s/ William C. O'Kelley

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX B

COURT RULES INVOLVED

1. Federal Rule of Civil Procedure 56(f)

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

2. Northern District of Georgia Local Rule 220-5(b)(2)

> The respondent to a motion for summary judgment shall attach to his response a separate and concise statement of material facts, numbered separately, to which he contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in his statement shall be deemed to have been admitted. The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of F.R. Civ.P. 56(f).